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JUL 6 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

CHECKRITE PETROLEUM, INC.,

Petitioner,

—v.—

AMOCO OIL COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Questions Presented

1. The Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.* (Supp. IV 1980) (hereinafter "PMPA"), (Pet. App. 49a-75a),* protects persons who purchase motor fuel or receive motor fuel on consignment from non-renewal without cause of their franchise agreements with motor fuel refiners. (15 U.S.C. § 2802). Can petitioner Checkrite Petroleum Inc. ("Checkrite"), a company which neither purchases motor fuel nor takes it on consignment, require renewal under the PMPA of an agreement with respondent-refiner Amoco Oil Company ("Amoco"), whereby Checkrite receives commissions from Amoco on gasoline sales made at service stations for which Checkrite served as Amoco's broker or finder?

2. Can Checkrite, a party with no authority or permission to use Amoco's trademark, invoke the PMPA restrictions on non-renewal of motor fuel franchises when that statute applies by its terms only to persons "authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel" [28 U.S.C. § 2801(4)]?**

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* References to pages of the petition are denoted by "Pet.", to pages of the petitioner's appendix by "Pet. App.", to pages of the brief in opposition by "Resp." and to pages of the appendix to the brief in opposition by "Resp. App.".

** Pursuant to this Court's Rule 28.1, respondent Amoco Oil Company states that its owner and parent company is Standard Oil Company (Indiana). Amoco Oil Company has an interest in the following companies which are not wholly owned by Amoco:

Amoco Canada Petroleum Co., Ltd.
Amoco Credit Corporation
Amoco Oil Holdings A.A.
Amoco Pipeline Company
Analog Devices
Cetus Corporation
Cypress Mines Corporation
Amoco (U.K.) Exploration Company
Cypress Anvil Mining Corporation
Solarex Corporation

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BRIEF IN OPPOSITION

Statement of the Case

This action was commenced by Checkrite in the United States District Court for the Southern District of New York by order to show cause seeking to preliminarily enjoin the expiration or non-renewal of Checkrite's contract with Amoco. Checkrite alleged in its complaint that it was entitled to the relief sought under those provisions of the PMPA which prevent a motor fuel franchisor from failing to renew a franchise in the absence of specific grounds enumerated in the statute and unless there is compliance with statutorily mandated notification procedures.* 28 U.S.C. § 2802.

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* There is no dispute that Amoco did not satisfy the PMPA termination requirements since it was Amoco's position that the Act does not apply to Checkrite.

The Checkrite-Amoco contract provided for payment by Amoco to Checkrite of commissions on gasoline sales made at service stations for which Checkrite had served as Amoco's broker or finder. The contract was entered on March 30, 1976 and was scheduled to expire by its terms on May 30, 1981, one month after service of the order to show cause. The PMPA became effective in June of 1978 during the pendency of the parties' contract.

The primary issue in this case centers on the provisions of the PMPA which define those persons or franchisees who are entitled to invoke the statutory restrictions on non-renewal of their franchises. By the plain language of the PMPA, those restrictions inure only to the benefit of persons who purchase motor fuel or who receive motor fuel on consignment. The undisputed fact is that Checkrite does neither. The Second Circuit's determination that the PMPA does not apply to the contract between Checkrite and Amoco (Pet. App. 2a), is thus eminently correct.

Even if Checkrite could meet this threshold statutory requirement, there is a separate equally dispositive reason why the PMPA does not govern the Amoco-Checkrite relationship. The statutory restrictions apply only in favor of persons who are "authorized or permitted, under a franchise, to use a trademark in connection with the sale, consignment, or distribution of motor fuel." 15 U.S.C. § 2801 (1), (4). It is undisputed that the Checkrite-Amoco agreement made no provision whatsoever concerning use of Amoco's trademark, a fact which is not surprising since Checkrite neither purchased nor sold Amoco gasoline. This fact alone precludes application of the PMPA in this case.

Actions of the District Court

On the return date of Checkrite's preliminary injunction motion, Amoco cross-moved to dismiss the complaint

on grounds that Checkrite did not and could not allege the threshold requirement of the statute—that it had purchased motor fuel from Amoco or had received it on consignment. The District Court agreed that no such showing could be made (Pet. App. 19a), but issued an injunction and denied Amoco's motion to dismiss on grounds that Checkrite qualified nonetheless as a franchisee entitled to require renewal of its franchise under the PMPA. The District Court concluded that the legislative history indicated a Congressional intent to "accord broad protection to persons 'marketing' branded fuels" regardless of whether those persons met the requirements set forth in the plain language of the Act (Pet. App. 22a).

Expressing an inclination to grant summary judgment to Checkrite, the District Court scheduled a conference to permit the parties to submit additional proof before finally determining whether to do so (Pet. App. 28a). Amoco then moved for summary judgment on grounds that even if the District Court's interpretation of the PMPA was correct, there was no proof that Checkrite met the Court's enunciated standard as a marketer of fuels entitled to invoke the Act. In a second memorandum and order, the District Court denied Amoco's summary judgment motion and permanently enjoined it from terminating the Checkrite-Amoco agreement as to all but one service station (Pet. App. 33a-40a).

The Decision of the Second Circuit

The Second Circuit reversed the judgment of the District Court and directed dismissal of the complaint, holding that the PMPA does not apply to the relationship between Amoco and Checkrite (Pet. App. 2a). The rationale was that Checkrite does not come within the plain terms of the PMPA because it neither purchases motor fuel nor takes

motor fuel on consignment from Amoco (Pet. App. 5a). The Court found no reason to look beyond the plain statutory language for expressions of legislative intent and determined that even in so doing, there was no support for the District Court's conclusion that Congress intended to cover a broad class of persons engaged in marketing branded motor fuel regardless of whether those persons were purchasers or consignees (Pet. App. 5a-6a).

The Amoco-Checkrite Agreement

The Amoco-Checkrite agreement was designated by the parties as a "Broker-Contract" and refers to Checkrite throughout as the "Broker" (copy of the Amoco-Checkrite agreement annexed in Resp. App. 1a-10a). Under that agreement, Checkrite represented to Amoco that there were fully equipped and operating service stations (listed on an annexed contract schedule) which were leased to or owned by retail dealers wholly separate from Checkrite (Resp. App. 2a). Checkrite was free to bring new dealers to Amoco but Amoco had the "sole option" to accept or reject new accounts (Resp. App. 2a). The agreement provided that the Broker would cause the dealers to execute Dealer Sales Agreements with Amoco but would not participate in any way in the operation of the stations and would forfeit commissions for any station where the Broker became the retail dealer (Resp. App. 2a, 8a). The agreement nowhere provides for transfer of any kind by Amoco to Checkrite of motor fuel products (*see* Resp. App. 2a-10a), and it is the conceded fact that Checkrite does not buy or sell any Amoco gasoline, takes none on consignment, and does not order, store, or deliver any gasoline sold by Amoco to any dealers. Thus, Checkrite's assertion in its Petition to this Court that it is an important "arm in the distribution process, and a co-distributor with Amoco, in

short, a distributor in fact and function" (Pet. 11; *see* Pet. 7, 10), is totally inaccurate.*

Amoco agreed to pay Checkrite a commission of 1.9 cents for each gallon of gasoline sold and delivered by Amoco to the dealers and 10% of the dollar volume of motor oil delivered to the same dealers (Resp. App. 3a).

The Broker contract contains no provision whatsoever about the use of Amoco's trademark by Checkrite (*see* Resp. App. 2a-10a).

Amoco's Agreements with the Dealers

The Dealer Agreements which Amoco entered with the dealers brought to it by Checkrite provide for sale and delivery by Amoco of gasoline and diesel fuel to the dealers at Amoco's standard tank wagon prices (copy of a Dealer Agreement with one of the dealers brought to Amoco by Checkrite annexed in Resp. App. 11a-16a). The Dealers are responsible for payment (Resp. App. 13a). The same agreement sets forth terms and conditions for use of Amoco's trademark by the dealers, who are expressly permitted to sell other brands of gasoline as long as Amoco's trademark is not infringed (Resp. App. 14a-15a, 12a).

Summary of Argument

There is no conflict between the Second Circuit's decision in this case and the decision of any court. *Central Hanover Bank & Trust Co.* v. *Commissioner of Internal Revenue*, 159 F.2d 167 (2d Cir.), *cert. denied*, 331 U.S. 836 (1947) merely enunciates the general principle that statu-

* Checkrite repeatedly refers to its "supply" agreements with the dealers which it brought to Amoco (Pet. 4, 5, 6, 16). Checkrite never supplied any retail dealers with Amoco product since, of course, Checkrite had no such supply.

tory construction requires consideration of the intent of the legislation as a whole, a principle which is totally consistent with the Second Circuit's decision in this case (Resp. 7).

The Second Circuit's decision here, a direct application of plain statutory language to undisputed facts, presents no important question of federal law which should be settled by this Court. Counsel for Amoco know of no other pending cases which raise the issue presented here (Resp. 7-8).

The Second Circuit correctly decided the issues raised by this case. Checkrite cannot require renewal of its agreement with Amoco under the PMPA because Checkrite neither purchases motor fuel nor takes it on consignment and has no permission or authorization to use Amoco's trademark (Resp. 8-11).

The Second Circuit correctly rejected the unprecedented standard for PMPA eligibility fashioned by the District Court. In any event, Checkrite wholly failed to prove that it meets that standard (Resp. 11-12).

Reasons for Denying the Writ

1. The Second Circuit Decision Does Not Conflict With the Decision of Any Court and Presents No Important Questions of Federal Law Which Should Be Settled by This Court

The decision of the Second Circuit Court of Appeals in this case is a straightforward application of the plain language of the PMPA to undisputed facts concerning Checkrite's relationship to Amoco.

Checkrite does not contend, as indeed it cannot, that this decision conflicts with the decision of any other federal

court. Nor is there present here any intra-Circuit conflict as Checkrite erroneously contends (Pet. i, 12).

Checkrite cites as the allegedly conflicting Second Circuit decision, *Central Hanover Bank & Trust Co.* v. *Commissioner of Internal Revenue*, 159 F.2d 167 (2d Cir.), *cert. denied*, 331 U.S. 836 (1947), a case where the Second Circuit was called upon to construe a complicated provision of the Internal Revenue Code governing inclusion of assets in a decedent's estate. The determination of the *Central Hanover* Court which is claimed to conflict with the present case is quoted at page 20a of the Petition before this Court. The quoted language merely states the established general principle that a Court engaged in statutory construction should consider along with the plain words of a statute, the purpose or object intended by the statutory scheme as a whole. Even a cursory reading of the Second Circuit decision here reveals that there is no conflict whatsoever with the rule enunciated in the *Central Hanover* case.

Nor is there any merit to petitioner's contention that this case presents an important question of Federal law which should be settled by this Court (Pet. 12). Checkrite relies on the fact that no other Court has considered whether a broker such as Checkrite comes within the PMPA definition of "franchisee." In the context of this case, that fact militates against issuance of a writ of certiorari rather than in its favor. The Second Circuit's indisputably correct application of the clear statutory language to the undisputed facts of this case stands uncontradicted and it is unlikely that any other court will reach a different result. Counsel for Amoco know of no other pending or threatened actions raising the issue of PMPA applicability to the relationship between a refiner and a broker or commission agent.

2. The Second Circuit Fully Considered and Correctly Decided the Issues Presented by This Case

Checkrite's primary argument in support of its Petition to this Court is that the Second Circuit failed to consider the intent of Congress in enacting the PMPA (Pet. 13-17). This argument is unavailing.

The Second Circuit correctly held that the legislative intent behind the statutory provisions in issue in this case can be fully and fairly gleaned from the plain and unambiguous language of the statute itself (Pet. App. 5a-6a). *E.g., United States* v. *Brown*, 555 F.2d 407, 415n. (5th Cir. 1977), *cert. denied*, 435 U.S. 904 (1978) (when a statute is plain on its face recourse to legislative history is unnecessary). *See Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979); *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917) ("It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms.")

Moreover, there are ample grounds for the Second Circuit's determination that the legislative history, which Checkrite argues was erroneously overlooked, wholly fails to support the conclusion that Checkrite is a protected franchisee under the PMPA. In addition to the reasons which the Second Circuit cites for its determination (Pet. App. 6a-9a), there is absolutely nothing in the legislative history of the PMPA which is in any way inconsistent with the statutory definition of a "franchisee" as one who purchases motor fuel or who receives it on consignment. Nor is there any indication that Congress intended the Act to have a broadly remedial purpose extending beyond the carefully delineated categories set forth in the statutory definitions. If Congress had intended to cover entities with functions *similar* to those defined in the statute, it could

have so stated in the statute itself. The fact is that Congress did not.*

Checkrite's second argument is that the PMPA is a codification of an equitable principle (Pet. 17-20). Even if this questionable characterization of the legislative intent is accepted, the PMPA is quite plainly a statute in derogation of common law contract rights of the parties. Without the statute, motor fuel franchisors would be free to terminate franchises in any manner consistent with the parties' contract. The PMPA removes this right and imposes exclusive statutorily mandated grounds for franchise termination. The law is clear that a statute which abolishes common law rights must not be construed so as to alter the common law "further than its words import." *United States* v. *Mead*, 426 F.2d 118, 123 (9th Cir. 1970). *See e.g., Bauers* v. *Heisel*, 361 F.2d 581, 587 (3rd Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967); *American Sheet Metal, Inc.* v. *Em-Kay Engineering Co., Inc.*, 478 F. Supp. 809, 814 (E.D. Cal. 1979).

Checkrite's remaining argument in support of its Petition is that termination of its contract with Amoco will ultimately result in termination of the Amoco dealers for which Checkrite served as the broker. This argument is based upon Checkrite's claim that it controls the brand of fuel to be sold by the dealers and will be compelled for economic reasons to dictate a change in brands if its contract with Amoco is not renewed (Pet. 4, 7). In advancing this

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* Of course, Checkrite does not perform any function which is similar to purchasing gasoline or taking it on consignment.

Examination of the PMPA reveals that many persons involved in the business of marketing motor fuel are clearly excluded. Non-branded retailers and distributors are not protected since they have no trademark rights. 15 U.S.C. § 2801(4). Nor are employees who operate service stations for refiners, distributors or dealers, 15 U.S.C. § 2801(6)(B), carriers who transport motor fuel, terminal operators, pipeline companies, (*id.*), landlords of service stations or affiliates of retailers. 15 U.S.C. § 2801(7).

argument, Checkrite has made several misleading and inaccurate statements apparently calculated to create the impression that Amoco intended to terminate its agreements with the Checkrite dealers as well as its contract with Checkrite (*see* Pet. 4, 5, 6, 7).

In fact, as both the District Court and the Second Circuit expressly acknowledged (Pet. App. 21a; 9a), Amoco readily conceded from the outset of this litigation that the station operators are franchisees within the meaning of the PMPA who cannot be terminated absent compliance with the statutory termination provisions. This is so because they purchase and sell Amoco gasoline and are authorized to use the Amoco trademark. The Second Circuit was wholly justified in its conclusion that it was Checkrite and not Amoco which was threatening to interfere with the retail operators' status as Amoco dealers, and that Checkrite's acts to the dealers' detriment can hardly provide to Checkrite PMPA rights against Amoco.

It bears mention that Checkrite's Petition to this Court totally fails to address the fact that Checkrite has no authority to use the Amoco trademark. Both the term "franchise" and the term "franchisee" as defined in the PMPA require that there be authorization or permission to use a trademark. 28 U.S.C. § 2801(1), (4). (Resp. 2, *supra*). The requirement of trademark authorization is far from a technical one. It is consistent with the statutory intent to protect only those who acquire use of a motor fuel trademark or acquire the ability to authorize others to use it, *i.e.*, purchasers, resellers, and consignees of branded motor fuel.

Checkrite never pleaded or proved that it had any such authorization or permission, as indeed it did not under the Amoco-Checkrite agreement or otherwise. The Second Circuit expressly refrained from determining whether Check-

rite met this requirement for PMPA protection on grounds that the Court's holding made that determination unnecessary (Pet. App. 9a n.). Even if the Circuit Court somehow erred in its rejection of Checkrite's claim to coverage under the PMPA on grounds that it is neither a gasoline purchaser or consignee, that claim must fail because Checkrite had no rights to use Amoco's trademark.

One final point warrants brief mention. Petitioner strongly urged the Circuit Court to adopt the District Court's conclusion that Checkrite's control over its dealers made it in economic reality a "jobber" entitled to PMPA protection. The District Court based this conclusion in large part upon its determination that "Checkrite . . . has a captive group of station operators pledged to it by contract to sell whatever brand of motor fuel it designates." (Pet. App. 27a).

The Second Circuit correctly rejected this conclusion, noting that a typical "jobber" is a wholesaler or one who "buys and sells goods for others" (Pet. App. 8a). These activities fit squarely within the PMPA statutory definition of "franchisee" if trademark authorization is present. Checkrite, of course, neither purchased fuel nor took it on consignment, and has no distribution system or equipment, no trucks, storage capacity, sales force or credit with Amoco. It has absolutely nothing in common with a jobber.

This Court also should be aware that Checkrite totally failed to prove that it possesses the kind of economic control of its dealers which was the touchstone of the District Court's *sui generis* formula for PMPA eligibility. The Second Circuit did not address this failure of proof because it correctly rejected the ambiguous standard articulated by the lower court. The record shows that Checkrite failed to prove that there was even one retail station with an agree-

ment in effect giving Checkrite effective control over the brand of gasoline to be sold.

Thus, even applying the District Court's unprecedented interpretation of the PMPA, Checkrite's claim to coverage under that statute would fail as a matter of fact.

CONCLUSION

For each of the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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